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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
1998 Biennial Regulatory Review -)
Review of the Commission's Broadcast)
Ownership Rules and Other Rules)
Adopted Pursuant to Section 202 of the)
Telecommunications Act of 1996)

MM Docket No. 98-35 /

To: The Commission

**RESPONSE OF THE NETWORK AFFILIATED STATIONS ALLIANCE
TO EMERGENCY REQUEST OF VIACOM INC. FOR
INTERIM RELIEF PENDING JUDICIAL REVIEW**

The Network Affiliated Stations Alliance ("NASA") submits this response to the Emergency Request of Viacom Inc. for Interim Relief Pending Judicial Review.¹ NASA feels constrained to submit this response because Viacom's Emergency Request attempts to challenge a general rule with broad application. NASA has not participated in proceedings on particular transactions and does not seek to do so here. But the caption of this proceeding is the Commission's *Biennial Review* in which the Commission reported to Congress that the 35% broadcast ownership cap still serves the public interest. Three of the four networks have challenged that report in court. Apart from the inappropriateness of the challenge (it is odd, to say the least, to seek judicial review of an agency's report to Congress), Viacom's filing raises the possibility that the principle and policy rationale for the cap will be decided, for all practical purposes, in the context of this stay request. Viacom has signaled this strategy in demanding

¹ *Emergency Request of Viacom Inc. for Interim Relief Pending Judicial Review* in MM Docket No. 98-35 (filed Mar. 9, 2001).

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Commission action on its stay request by today. The likelihood, if the Commission does not accede to Viacom's demands, is that Viacom will seek a stay in the D.C. Circuit early next week. Since if Viacom were to have its way, there is the real and substantial risk that this fundamental principle will be resolved in the context of the stay request here and in court, NASA must participate vigorously in this matter in order to defend the constitutionality and policy soundness of the cap which it believes is essential to healthy localism in the American system of television.

Viacom's request for relief is not justified and should be denied. Many months ago, in a separate proceeding in a separate docket, as a condition of approving the merger of Viacom and CBS, the Commission issued a *Divestment Order* requiring Viacom to come into compliance, no later than May 4, 2001, with the national broadcast television ownership rule, 47 C.F.R. § 73.3555(e).² Viacom closed the transaction the day after the Commission released the *Divestment Order*, without seeking Commission reconsideration or judicial review of it.³ Now, however, Viacom is seeking to undo the consequences of its prior decisions and this Commission's prior order through a last-minute filing in a different proceeding. Moreover, for reasons that the Commission has explained in its submissions to the U.S. Court of Appeals for the D.C. Circuit in *Fox Television Stations, Inc. v. FCC*, Nos. 00-1222 and consolidated cases, the petitions for judicial review of the Commission's *1998 Biennial Regulatory Review* will not

² *Applications of Shareholders of CBS Corporation (Transferor) and Viacom, Inc. (Transferee) for Transfer of Control of CBS Corporation and Certain Subsidiaries*, 15 FCC Rcd 8230 (2000) (*Memorandum Opinion and Order*) ("Divestment Order"). 47 C.F.R. § 73.3555(e) limits the aggregate national audience reach of all stations owned or controlled by a single entity to 35% of the population of the United States.

³ See Mark Wigfield & Martin Peers, "Viacom Receives Approval of FCC For CBS Purchase," *Wall Street J.*, May 4, 2000, at B16 ("The Federal Communications Commission approved Viacom Inc.'s \$46 billion acquisition of CBS Corp., clearing the way for the deal to close today, the companies announced last night.").

result in a judicial order invalidating the 35% ownership rule. Accordingly, Viacom's request should be denied.

I. VIACOM FILED ITS REQUEST IN THE WRONG PROCEEDING

Viacom has filed its request in MM Docket No. 98-35, the Commission's proceeding considering the advisability of retaining the 35% ownership cap. Yet it is seeking relief directed to a different Commission Order (the *Divestment Order*) entered in a different FCC docket. If Viacom is dissatisfied with the *Divestment Order*, the proper course is for it to make a filing in that docket seeking a stay or modification of the order. The reason that Viacom did not follow that course is not difficult to discern. Viacom closed the transaction with CBS without seeking Commission reconsideration or judicial review of the *Divestment Order*, and the time allowed for seeking reconsideration or judicial review of the *Divestment Order* has long since expired. If parties were able to use a filing in one FCC docket as a means to attack FCC orders issued in another docket, the deadlines for seeking Commission reconsideration and judicial review would have little meaning. For this reason, Viacom's request should be denied.

II. GRANTING VIACOM'S REQUEST FOR RELIEF WOULD BE PARTICULARLY INAPPROPRIATE BECAUSE THE *BIENNIAL REPORT* IS NOT A FINAL AGENCY ACTION AND IS NOT RIPE FOR JUDICIAL REVIEW

Granting Viacom's request would be particularly inappropriate in this case. The petitioners in *Fox Television Stations* are seeking judicial review of the Commission's 1998 *Biennial Review*. Yet the Commission is on record in the court of appeals that the *Biennial Review* does not constitute final agency action subject to judicial review under the Administrative Procedure Act and is not ripe for judicial review.⁴ Even if the court of appeals

⁴ See Motion to Dismiss and Motion to Defer Filing of Certified Index to the Record of the Federal Communications Commission in *Fox Television Stations, Inc. v. FCC*, Nos. 00-1222 and (continued...)

were to reach the merits, it would address only the *Biennial Review*, not the rule itself. For these reasons, the petitions for review cannot and will not result in invalidation of the 35% ownership cap.

III. VIACOM IS SEEKING RELIEF FROM A SITUATION THAT IT CREATED

Viacom entered into the CBS transaction with full awareness of the 35% ownership rule, and fully expecting that the rule would apply to the transaction. In fact, the CEOs of both Viacom and CBS testified before Congress that “Viacom and CBS commit to making any necessary divestitures as expeditiously as possible after the merger so that their ownership of broadcast stations complies with all of the FCC’s local broadcast ownership rules, including the TV duopoly and TV-radio cross-ownership rules.”⁵ Viacom could have sought a permanent waiver of the rule, but it chose not to do so, requesting instead a waiver for a limited period of time to come into compliance with the rule.⁶ In these circumstances, Viacom should not be permitted to seize on a recent decision of the D.C. Circuit involving a different rule, different facts, different legislative history, different parties, and different legal issues as a basis for undoing the Commission’s order and choices made by Viacom itself.

consolidated cases (D.C. Cir. Aug. 7, 2000); *see also* Response of Movant-Intervenors Network Affiliates Associations and Network Affiliated Stations Alliance in Support of the FCC’s Motion to Dismiss in *Fox Television Stations, Inc. v. FCC*, Nos. 00-1222 and consolidated cases (D.C. Cir. Sept. 5, 2000).

⁵ Prepared Statement of Sumner Redstone, President and CEO of Viacom, and Mel Karmazin, President and CEO of CBS, before the Senate Judiciary Committee, Subcommittee on Antitrust, Business Rights and Competition (Oct. 28, 1999).

⁶ *See Request for Time to Come into Compliance with the Dual Network and National Television Multiple Ownership Rules*, Exhibit F to Viacom Inc.’s FCC Form 315, at 2 (Nov. 1999) (requesting “that the Commission grant this transfer of control application with a 24 month period of time post-closing for the parties to take all steps necessary to come into compliance with the Dual Network and National Television Multiple Ownership Rules”).

IV. VIACOM MISREADS THE D.C. CIRCUIT'S *TIME WARNER* DECISIONS

Contrary to Viacom's assertions, the D.C. Circuit's *Time Warner* decisions stop well short of implying, much less holding, that the 35% ownership cap is unlawful. A brief summary of some of the key holdings of those decisions demonstrates that this is so:

- In *Time Warner I*, the D.C. Circuit *upheld* both “horizontal” and “vertical” limits on cable television operators against a facial constitutional attack.⁷
- The court applied less-demanding “intermediate scrutiny” analysis rather than the more demanding “strict scrutiny” sought by Time Warner.⁸
- The court held that preservation of competition and promotion of diversity in ideas and speech both qualify as important governmental interests, and that Congress had reasonably inferred that increases in concentration threaten both interests.⁹ Because the 35% broadcast ownership cap also seeks to preserve competition and promote diversity, this aspect of the *Time Warner* decisions provides strong support for the validity of a broadcast ownership cap.
- In *Time Warner II*, the court remanded the 30% cable ownership limit to the Commission for further consideration because it found “no evidence at all that indicates the prospects for collusion.”¹⁰ In remanding to the Commission, the court went out of its way to note that “[s]ubstantial evidence does not require a complete factual record -- we must give appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency.”¹¹ The court also expressly left open “the possibility that there are theories of anti-competitive behavior other than collusion that may be relevant to the horizontal limit and on which the FCC may be able to rely on remand.”¹² Thus, the D.C. Circuit recognized that a 30% limit might survive judicial review on a more fully-developed record.

⁷ See *Time Warner Entertainment Co. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000) (“*Time Warner I*”).

⁸ See *id.* at 1316-22.

⁹ See *id.* at 1319-20.

¹⁰ *Time Warner Entertainment Co. v. FCC*, slip opinion, No. 94-1035, 2001 U.S. App. LEXIS 3102, at 20 (Mar. 2, 2001) (“*Time Warner II*”).

¹¹ *Id.* at *20 (citing *Turner Broadcasting System v. FCC*, 520 U.S. 180, 196 (1997)).

¹² *Id.* at *21.

The 35% broadcast ownership cap was set by Congress after careful consideration during the debate on the 1996 Telecommunications Act. Both the full House and the full Senate debated and voted on specific amendments addressing the appropriate level of national ownership.¹³ Where Congress has made such a clear legislative choice, the Commission should enforce it.

V. VIACOM IS NOT FACING A TRUE EMERGENCY

Viacom has styled its submission an “emergency” request, and has stated that it plans to seek relief from the D.C. Circuit if the Commission has not acted by Friday, March 16, 2001, just one week after Viacom’s request was filed. Viacom does not have an adequate justification for declaring an “emergency.”

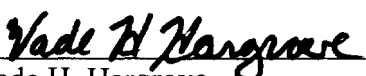
Viacom has known that it faced a May 4 divestiture deadline since May 3, 2000, the date the Commission issued the *Divestiture Order*. Similarly, *Time Warner II* has been pending before the Court of Appeals for many months; the oral argument in *Time Warner II* took place almost five months ago, on October 17, 2000. Nothing prevented Viacom from seeking relief prior to the D.C. Circuit’s recent decision in *Time Warner II*. Parties should not be permitted to close major transactions without challenging the conditions imposed by the Commission, wait until long-established deadlines are almost upon them, and then declare an “emergency” that disrupts orderly procedures of the Commission and the courts.

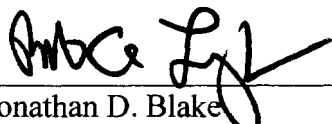
¹³ See, e.g., 141 Cong. Rec. H8063-64 (daily ed. July 31, 1995) (35% cap amendment by Rep. Markey); 141 Cong. Rec. S8453 *et seq.* (daily ed. June 15, 1995) (Senate debate on 35% versus 50% ownership cap); 141 Cong. Rec. S7926-27 (daily ed. June 7, 1995) (35% cap amendment by Sen. Dole).

CONCLUSION

For the foregoing reasons, the Commission should deny Viacom's request for interim relief.

Respectfully submitted,


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March 16, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2001, a copy of the foregoing Response of Network Affiliated Stations Alliance to Emergency Request of Viacom Inc. for Interim Relief Pending Judicial Review was delivered by first class U.S. mail to the following:

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